right therefore to use it, notwithstanding the patent granted to him. From the description already given of the Howe machine, and of the Crosby machines as exhibited on the trial, it appears manifest, that the mode of operation of one, as it respects the improvement or invention as claimed by Howe, is different from the mode of operation of the other. Howe's invention was but an alteration of the old English crimping bar, by the cutting of transverse notches through the bar, where the two jaws meet; to enable the pins to pass through these notches, and thereby stick the paper, while it was within the crimping jaws, and while it was being crimped. The notches or apertures of some kind were an essential means to effect the result, which Howe designed by his invention. Without them, his improvement did not exist. There are no notches or apertures, in Crosby's crimping rollers, and nothing which bears any resemblance or similitude to them. The pins are stuck, not when the paper is within the crimping jaws, but after it had passed out of them. The device of Crosby is essentially different from that of Howe. The pins are stuck by Howe's invention while the paper is within the crimping jaws, by means of notches or apertures in the crimping bars. No such means are used by Crosby. The principles of the two machines, in their modes of operation, and in the means used by each to effect the result accomplished are different. They are not therefore identical. One is not an infringement upon the other.

With this view of the case, the decree must be that the complainants' bill be dismissed with costs to the defendants.

In the above opinion Judge Nelson fully concurs.

New York Superior Court—Special Term, November, 1854.

MORRIS KETCHUM ET AL *vs.* THE BANK OF COMMERCE OF NEW YORK.

1. Where stock sold by an avowed owner, dealing as owner, turns out afterwards to be spurious and void, by reason of its having been illegally issued, the purchaser may recover back the price paid, though the seller was ignorant of his want of title.

2. A pledgee of stock on collateral security, with power to sell at public or private sale without notice, and to assign coupled with a blank power for that purpose, who has actually transferred the stock into his own name, stands as to third persons in the light of owner, though himself still subject, it seems, to the pledgor's right to redeem; and is therefore liable to an action by a purchaser from him for the price paid, in case the stock turns out spurious.
3. The principles which govern a common law partnership, are in general applicable to a Joint Stock Company, whether incorporated or not, except so far as modified by statute, or special rules of law. The introduction of new members into such association can, hence, be only authorized by joint consent; but this consent may be exercised either on each special occasion, or may be delegated to a particular, without power to redelegate it to an individual. The issue of certificates of stock in such association, being the introduction thereinto, of new partners, falls within this principle.
4. *Held* on the construction of the charter of the New York and New Haven Rail Road Company, that a resolution of the Board of Directors of that company, by which Robert Schuyler was appointed "transfer agent" of its certificates of stock, was a valid delegation of power, and that certificates of stock issued by Schuyler as such agent were binding on the Company.
5. The limitation of the amount of capital stock of the Company, in its charter, *held* not to prohibit the Board of Directors, nor their agent thus appointed, as regards third persons, from increasing the number of shares of stock, beyond the proportion between their par value and the capital stock.
6. The registration of certificates of stock in the books of the Company, though made a pre-requisite to the right of voting or of exercising any control in the management of the Company, is not necessary to a valid title in the stock itself; and and so the absence of a power to transfer will not affect the rights of a *bona fide* purchaser of a certificate of stock; he would thereby only become the equitable instead of the legal holder, but with the right to procure a transfer on the books of the Company.
7. Where a transfer agent appointed by the Directors of an Incorporated Joint Stock Company, has fraudulently over issued stock, a director taking such stock directly from the agent is chargeable with constructive notice, especially where the fraud would have been discoverable by an inspection of the books of the Company. But this does not apply, where he purchases from a *bona fide* holder; and query, whether such constructive notice would affect a firm of which the director was a member.

This action was brought to recover from the defendants the sum of $25,000, with interest, paid by the plaintiffs, upon a transfer of 370 shares of stock of the New York and New Haven Railroad Company. This stock had been pledged to the Bank of Commerce by the firm of R. & G. L. Schuyler. Various grounds for the de-

mand are set up in the complaint; but the main question depended upon the alleged illegality and valueless character of the stock, as having been fraudulently and falsely issued,

Messrs. *Ketchum* and *G. Wood*, for Plaintiffs.
Messrs. *Silliman* and *D. Lord*, for Defendants.

The opinion of the Court was delivered by

HOFFMAN, J.—The course adopted in adducing the evidence, and the arguments of counsels in this cause, have led to the consideration of the validity of the stock of the New York and New Haven Railroad Company, issued by the late transfer agent, to an amount exceeding one million seven hundred thousand dollars. I am now satisfied that the case cannot be decided without passing upon that question. I approach it with anxiety and distrust. The interests involved are of startling magnitude, and the questions grave and novel. An obscure and untrodden field is before me, and there are no lights kindled by the wisdom and labors of former judges to mark out the path. Such considerations urge me to a protracted and deliberate examination; but I shall fulfil a higher duty to the community by a prompt decision, which will speed the cause upon its way, for the matured determination of the general term of this Court. I shall consider the case under the following heads:—

1. The position and rights of the parties growing out of the presentment and refusal of the check for $10,000, and the ground assumed by the Bank of Commerce for such refusal.

2. The facts attending the possession and transfer of the securities held by the bank to the plaintiffs, and the nature and evidence of the apparent title to the 370 shares of stock made over to them.

3. The ground of the proposition of the defendants, that in point of fact the transfer made to the plaintiffs, did cover and represent undoubted stock.

4. Whether the action to recover back the price can be maintained upon the assumption, that the stock acquired was utterly void, and vested the plaintiffs with no right or interest whatever.

5. If such action can be maintained, then what are the true rights and position of the holders of such spurious or fabricated stock in relation to the company.

6. Whether the plaintiffs are chargeable with such notice of the character of the stock, as will vary any rights which innocent holders of spurious stock may possess.

1.—Upon the first point of examination the decision is in substance as follows: that no right attached to the plaintiffs by reason of the check of R. and G. L. Schuyler for $10,000, upon the deposit made after the presentment and refusal of payment of such check. That the right of the bank to retain the funds in deposit, accrued on the 3d of June, 1854, and could not be affected by a redemand of the check on the morning of the 1st of July.

That this right was not affected or impaired by reason of the stock notes given upon the loan by the bank being on demand, and that no express demand was proven; nor by the fact of the bank being in possession of the stock as collateral, as well as having the money in hand.

2.—Under the second head, the facts attending the possession and transfer of the securities to the plaintiffs, and the nature and extent of their apparent title to the three hundred and seventy shares of stock, the subject of the action, are stated at length; and are of great importance in determining the rights of the parties in this particular respect, but not necessarily so upon the general and great questions in this cause. A conclusion is, however, stated, that in no event could the plaintiffs recover, without allowing the bank to deduct the $10,000, the amount of the check paid upon arrangement. The principle of rescission, upon which the plaintiffs proceed, involves the principle of restitution.

The fourth subject of inquiry was, whether an action to recover the amount could be maintained upon the assumption that the stock acquired was utterly void, and vested the plaintiffs with no right or interest whatever. It is in the first place urged, that if this had been a sale of stock by an avowed owner, dealing as owner, no other warranty of title would have been implied than that the vouchers of stock were genuine and that the defendants were not cognizant of

any defect in the title. But in my opinion, this proposition cannot be maintained. It is admitted that the general rule, as stated by Chancellor Kent, is the law of our State; that if the seller is in possession of the article, and sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title; and the opinion of Justice Buller, in *Pasley* vs. *Freeman*, 8 T. R. 58, that if the seller affirms the chattel, which is not in his possession, to be his, he is bound to answer for the title, is approved of by Chancellor Kent as possessing both good sense and equity. In *McKey* vs. *Cocker*, 3 Barbour S. Ct. Rep. 326, Justice Parker critically examines the authorities and sustains the rule thus expressed. At this period in the progress of the law relating to trade and commerce, when the representatives of property or money, like certificates of stock, are so unboundedly dealt with as the property itself, I see no ground for a distinction between the possession of a certificate and the possession of a material chattel. Sir John Leach held that a bill might be sustained for the delivery of certificates of stock, because they were the evidences of a legal right, and necessary to constitute the party a proprietor. An action at law would not give the property, but merely a personal responsibility for damages recovered. *Doloret* vs. *Rothschild*, 1 Sim. & St., 590. The cases of *Morley* vs. *Attenborough*, Welsb., H, and Gordon, 3 Exch. Rep. 499, and *Chapman* vs. *Speller*, 14 Queen's Bench, R. 621, do not shake this proposition. The question in the former case related to a sale by a pawnbroker. Evidence of usage was introduced into the cause; besides, at the close of the opinion is the following language: "It may be, that though there is no implied warranty of the title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not

made at the trial, and the only question is whether there is an implied warranty."

In *Chapman* vs. *Speller*, the question of warranty, or right to recover, on failure of title to what was contracted for, did not arise. This is the language of the Court. The party had bought only the right which the vendor had acquired at the sheriff's sale. That was merely the title and interest of the judgment-debtor. But the following important authorities are closely applicable to the present case, as now considered. *Jones* vs. *Ryde*, 5 Taunton, 488, was this: The defendants were bill brokers, and possessed of a navy bill, which purported to have been issued by the Navy Board, to have been registered on the 13th of July, 1813, and to be payable on the 15th of October, 1813, drawn on the Treasurer of the Navy, to Boll & Hobbs, on their order, for the sum of £1,884 16*s.* 10*d.* It seems that, on the face of the bill, the property tax was deducted, showing a result of £1,883 16*s.* 3*d.* The bill came into the hands of the defendants, who procured the plaintiffs to discount it, and received the avails. It appeared that the bill issued from the transport office, for £884 16*s.* 10*d.*, and before it was discounted, some person had altered it, by prefixing the figure 1 to the figures 884 and 883 in the several places in which they occurred, and prefixing the figure 1 to each of the dates of the 7th of July and 5th of October. All the parties were unconscious of the alterations. The true amount, however, had been paid by the navy office, and the present action was brought to recover the difference, about £1,000. The action was for money had and received, and was sustained. C. J. Gibbs observed: "Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description, viz., genuine; the other, in taking it as such. Upon its afterwards turning out that the bill, to a certain extent, was a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. . . . In the present case, the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice, to which I should not refer as genuine law, but that it is said by my brother *Lens* to be

sanctioned on the authority of a case so decided at *nisi prius* by Mansfield, Ch. J., viz: where forged bank notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable that the bills are such as they purport to be. In *Westropp* vs. *Solomon*, 8 Common Bench Rep. 345, the case, as far as the present question is concerned, was this: A share-broker and member of the Stock Exchange was employed to sell certain certificates of scrip of the Buckinghamshire, &c., Railroad Company. He sold the certificates, and handed over the proceeds to his employer. The certificates were found to be forged, and the broker, under certain rules of the Stock Exchange, was called upon, and paid to the purchaser a certain value as for genuine certificates, which exceeded the amount for which he had sold the scrip. For this amount he brought his action. The employer, under a count for money paid, deposited in Court the sum he had received as the avails of the sale. The question arose as to the excess which the broker had been compelled to pay. There was also a count as upon a promise that the certificates were genuine. It may be noticed that these regulations of the Board bound its members to compliance with a resolution like that in question, or to be expelled. It was held that there could be no recovery on the special count, there being no promise, express or implied, that the shares were genuine; that under the account for money received, the broker could only recover the amount paid by him to his employer, and that the resolution of the Board could not affect the latter so as to make him answerable for the excess. In delivering the opinion, Maule, J., says: "The defendant employed the plaintiff to sell these identical shares, who sold them according to that employment. The question is, what is the result of such a sale when the certificates turn out not to be genuine. There was no fraud or negligence on either side. The certificates were such as to deceive everybody who had anything to do with them. Still they were invalid. There cannot be a doubt, then, that the vendees would be entitled to recover back the money they had paid for them." Nothing has been cited, nor have I dis-

covered any authority sufficient, to overthrow or impair these cases. I cannot see why they do not determine the point now considered. Whether the offence is indictable as a forgery, has been doubted by able counsel, but we have the doctrine of Chief Justice Abbott, that a combination to fabricate shares of a company beyond the stipulated number, constitutes an offence punishable in a criminal way. *Rea* vs. *Mott*, 2 Carr. & Payne, 521.

It is next urged on behalf of the defendants, that they were never owners; never affirmed themselves to be owners, nor dealt as such in relation to this stock, but that throughout, they negotiated as pledgees, acted as pledgees, and transferred the stock in that capacity, and in no other; that they looked throughout to the Messrs. Schuyler, the true owners, for every authorization and source of their acts, and obeyed their directions, and assigned nothing, and professed to assign nothing, but the mere interest of pledgees, which, on the requisition of the firm, they were absolutely bound to do. I have been greatly pressed with the argument, of which this is a brief summary; but, after much consideration, I think it is not conclusive. In the first place, it is to be remembered that the cashier, on the day of the known insolvency of the firm, (the 30th of June,) attempted to have a transfer of the stock made to the president of the bank, and would have procured it, had he applied a few minutes earlier. In the next place, he did effect the transfer on the morning of the 1st of July, before 11 o'clock, from his own name to that of the president, and received the new certificate about 12 o'clock, for 370 shares, having surrendered the two of 200 and 170 respectively. Again, the order of the firm authorized an assignment of the securities, and the arrangement was consummated by a delivery of the new stock certificate, with a blank power to the plaintiffs to transfer, signed by the president. The law, in respect to the sale of stock pledged, I take now to be, that the party, after default, may sell it at auction upon reasonable notice of the time and place, to the owner. If any other mode is provided in the contract, that will govern. *Brown* vs. *Howard*, Superior Court, T. R., 497. In both of the notes in question, the agreement is, that the stock may be sold at the board of brokers, or at public or private sale, at the option of the bank, and

without notice. I have had occasion to see several printed forms, in which the provision for a sale is the same. Although such a clause would, I think, be construed to mean a sale to a third person, yet there can be no legal objection to the pledgee of stock placing himself, under his power, precisely in the position of a mortgagee of land, who takes possession. I speak of the general law, not as affected by our statute. If so, the pledgee holds the stock, as owner, against every one but the pledgor, or those under him, who may have a right to redeem—a right to be enforced by calling for the transfer of an equal number of shares. The bank, in this case, did not exercise its power to sell at public sale, or at the board of brokers. But it is another question, whether it did not exercise the power of selling, at private sale, without notice, when it first caused the transfer to be made, which vested it with every recognized indication and evidence of ownership, and then transferred the stock to the plaintiffs. Again, the reason of allowing a recovery in cases like these, is, that money was paid for what was deemed an existing right, and when it is proven to have no existence, the party receiving ought not to retain it. Now, whether he got the money as pledgee or owner, does not appear to be of material consequence in such an aspect of the question. In the case of *Fatman* vs. *Loback*, 1 Duer Rep. 354, the Superior Court treat the filling up a blank power attached to a certificate of stock, and delivering them to another, as a conversion of a previous equitable title into a legal one; and they held that, whether this was done for the purpose of selling or hypothecating, made no difference as to the rights of a subsequent holder. I conclude that this action would lie to recover back the sum paid, deducting the $10,000, upon the assumption of the stock transferred being proven to be void and valueless.

5.—This consideration leads me inevitably to the question as to what are the rights and position of the holders of such fabricated stock, in relation to the company. I have before stated that as to the shares in question, they are plainly portions of this stock, whatever obscurity may attend the tracing of the rest. I cannot but add my fixed conviction that a vast mass of the disputed stock can be fol-

lowed and identified, and I believe that, could a competent tribunal prescribe some few and reasonable rules of appropriation and adjustment, the task would not transcend the power of mercantile ability to mark the whole. But it is enough in this instance, that I find these shares stamped clearly and indelibly with the sign of their birth in a fraud and fabrication. Is the railroad company and its innocent stockholders bound for these shares? and, if so, what is the nature and extent of their liability? These are inquiries which have stirred the mind of the commercial community, in a degree rarely known in this country, and which have evoked the exercise of the highest professional ability and learning in this, and our sister State of Connecticut, to meet and to solve them. It is unnecessary to enter upon that wide field of investigation, into the origin and nature of corporations, and the extent of their powers, over which the learning and reasoning of the able counsel would lead me. It is sufficient to say that the rules governing the ancient municipal corporations of cities and towns, can shed but little light upon a question like the present. Such corporations had originally their rise in the principle of protection of life and property, from the barons and kings, and watch and ward was the duty of the burghers, and the bond of their safety. Particular franchises were successively won, from fear or favor. They were all inroads upon feudalism, and were all personal and peculiar privileges. *Rise and Progress of Cities; Smith's Wealth of Nations*, vol. 3, page 171, et seq. But when the increase of trade and commerce led to an appreciation of the value of a combination of capital and effort—"when men, having learned what wonders could be accomplished by union, began to think that union was competent for everything"—(Dr. Channing)—the formation of partnerships began. Joint stock associations followed. The principle was at first a mere extension of the essential elements of a partnership to a greater number of members, with some variations of government. But the perils of personal responsibility to the members, and the unwieldly machinery of such a body, led to application to the State to give them the protection of an incorporation. Through all the judgments of courts, based upon the doctrines of the common law—

through all the legislation of England, and of our own and other States, applicable to associations incorporated or otherwise, we find the great principles of a partnership recognized, changed indeed, modified, or impaired, but still pervading and discernible. Confining the inquiry to the most affluent fountain of our law—the law of England—we find that joint stock associations were known before the act of 1719, called the Bubble act; and they were based upon the principle of partnership, with an attempt to make shares transferable, and to limit the personal responsibility of members. That statute recognized the existence of such companies, and speaks of their mischievous consequences—that they have attempted to act as corporate bodies, pretending to make their shares in stock transferable, without legal authority by statute or charter from the crown. The act then provided that all such undertakings and attempts were void and illegal, and especially the acting, or presuming to act, as a corporate body, the raising, or pretending to raise, transferable stock or stocks, or to assign any share, without authority. By section 25th, the act was not to restrain the carrying on of any home or foreign trade in partnership, in such a manner as had been usually done, or might be done according to law. The transferability of shares, unrestricted and unregulated, was a blow at the accountability of every member of a partnership, by rendering the tracing of debtors difficult, and sometimes impossible to the creditor. Such a power was, therefore, reserved for the parliament or the crown. After the act, however, the effort was perpetually made to engraft this principle upon the schemes of joint stock associations, and no less strenuously was it attempted to limit the personal responsibility of the members to the amount subscribed, and exempt them from the demand of creditors. But the courts of justice invariably defeated these attempts, and fixed upon these joint stock companies every material attribute of a common law partnership, in the non-assignability of shares, and the absolute personal liability of members. The expression of Lord Eldon was but the echo of a multitude of decisions, that the wealthiest noblemen in the land might be involved to his last acre, and his last shilling, by a connection with such a company. In the year 1825, by the Act of 6 Geo. 4

cap. 91, the Bubble act was repealed, and, for the first time that I am aware of, it was provided "That in any other charter thereafter to be granted by his Majesty, it should be lawful to provide that the members of such corporation should be individually liable in their persons and property, for the debts, contracts and engagements of such corporation, to such extent as his majesty might deem fit and declare." It is sufficient to notice here the policy of our own State, exhibited in the manufacturing statute of March, 1811, and found now in the constitution itself, in regard to banking incorporations. The personal responsibility of the members was recognized, although limited to the amount of their respective shares of stock. Sess. 34, ch. 37, Constitution of 1846, art. 8, sec. 7. From the earliest judicial decision in our State to the present time, companies organized under this act, have been spoken of as mere partnerships, with some of the privileges and powers of corporations. *Slee* vs. *Bloom*, 19 Johnson, 473; *Bridges* vs. *Penniman*, Hopkins, 304.

This view has been followed in a multitude of subsequent decisions upon the same or similar statutes. It is sufficient to refer to *Hargon* vs. *M'Culloh*, 2 Denio, 119, which contains reference to many of them. In these statutes the right of transferring shares was given, and the mode left to the by-laws of the company; and in the general railroad act of our State (Laws of 1850, ch. 140), the points of assignability and personal liability are regulated. By the eighth section, the stock may be transferred in the manner prescribed by the by-laws of the company, but no shares are transferable until all the calls have been fully paid in. By the tenth section, each stockholder is made individually liable to the creditors to an amount equal to the amount unpaid on the stock held by him for all debts, until he shall have paid up the whole amount due by him to the company; and all are made jointly and severally liable for debts to servants and laborers for services performed to the corporation, but after an execution against the company has been returned unsatisfied. The want of the attribute of transferability in shares of stock was a consequence of the policy of the English law, founded upon the principle of partnership. The attempt of joint stock associations

to render shares assignable, was denounced by the law, because it violated that principle; and the Legislature clothed companies with the power in opposition to the partnership law, and in doing so imposed certain restrictions and provisions, such as public registrations of the transfer, to obviate as far as possible the evils which dictated the common law rule. Details of the provisions upon this subject in some of the English acts may be found in the case of the *Cheltenham R. R. Comp.* vs *Daniels*, 2 R. R. and Canal Cas. 728, and in *Hebblewhite* vs. *McMorin*, ib. 51. Still through the whole stream of authority and principle in relation to illegal companies or companies privilege with an act of incorporation, the doctrine of partnership is visible. The former were unauthorized, and the latter statutory partnerships; but the basis of the association was the same. Thus in the case of *Ashby* vs. *Blackwell*, 2 Eden's Rep., 299, a case of important bearing upon most of the questions here, the plaintiff was possessed of £1,000 Melthian Bank stock, and employed John Price, a broker, to receive the dividends for her. Price forged a power of attorney from her, empowering him to sell the stock, which he did to the defendant Blackwell, and the stock was transferred to the latter on the books of the company. The bill was brought for a re-transfer of the stock or satisfaction from the trustees of the Melthian Bank. It was agreed that the plaintiffs were entitled to relief, and the question was whether Blackwell or the bank should bear the loss. A case was made of great carelessness on the part of the secretary, in receiving the forged power which was not authenticated as the by-laws of the company required. The lord keeper held that a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity, the rights remain as before. That as to Blackwell, he thought it was not incumbent upon him to inquire into the letter of attorney, because the letter of attorney in that and similar cases, was no part of the purchaser's title. The title was the admission into the company as a partner *pro tanto*, he accepting the stock on the condition of the partnership. The

letter of attorney is only the authority to the company to transfer. The company ought to answer for their servants' negligence. He decreed, that the stock be replaced in the name of the plaintiff, and that the bank pay Blackwell the amount he had paid upon the transfer, with interest. So, in *Bryant* vs. *the Warwick Canal Co.*, 23 Eng. L. and Eq. Rep. 91, Dec. 1853, a bill was filed by a shareholder on behalf of himself and all others, &c., to recover money paid into a company provisionally registered and then abandoned, although an official manager had been appointed. The bill was sustained upon the ground of an ordinary partnership right. So, in *Stevens* vs. *The South Devon Railroad Company*, 12 Eng. L. and Eq. Rep. 229, the principle of partnership was applied on a very important and complicated case, where a clause in a statute bearing upon the question was held directory, and the subject was considered one of internal management in which a majority of partners will decide. And so, in *Couro* vs. *The Fort Henry Iron Works*, 12 Barbour, 27, the Court say, "The tendency of modern decisions is to assimilate the action, duties and liabilities of corporations, to those of individuals and commercial partnerships." But the power to assign shares was a power to introduce new members into the partnership. The assignee was substituted for the assignor, in whole or in part, accordingly as the whole or a part of his shares was transferred. The holder of ten shares could introduce ten new partners in his place. True, they represented separately, what he represented in the aggregate; the representation collectively being of the same shares; but yet new partners were brought in by the will of one party alone. The general system adopted in unchartered companies, was to require a subscription to the deed of agreement or settlement. But while this was essential to constitute members among the associates, much less was sufficient to render a person responsible to creditors. And the very rule and distinction between the parties *inter se*, and to the world, was applied to these cases. See Wordsworth 182, *Maudsley* vs. *Le Blanc*, 2 Carr. & P. 409 n.; *Harvey* vs. *Kay*, 9 B. & C. 356, and *Ellis* vs. *Smœck*, 5 Bing. 521. Next, it cannot be contested that if a company was chartered with a definite limited capi-

tal, and nothing was declared respecting the amount of the shares, the company could adjust them at pleasure; and could give that power to the managers or directors. It is equally clear that the shareholders could authorize the directors to increase the number of such shares; and, if this could not be done by transcending the limit of the capital and adding to it, it must be understood as authorized to be done by diminishing the value of the shares. Cases can be imagined; cases, I understand, have occurred where such a method of raising money to meet the exigencies of a corporation, has been restored to. It will not do to say, that it cannot be imagined the stockholders intended to give a power, the effect of which would be to diminish their own profit. Such an answer might be made by a principal in every case of excess of authority. A joint stock company or a corporation then, if unfettered by express legislation, has an undoubted right to fix the number of shares into which the capital shall be divided, and when fixed, the associates may subsequently change it; and, if the power is reserved or implied in the articles of association, the directors or trustees may exercise such power. Thus, in the *Armsgate Railroad Company* vs. *Mitchell*, 6 Railway and Canal Cases, 236, the shares of a company were originally fixed at £25 a share, and, by a vote of the directors, were reduced to £20 a share. It was held that this was lawfully done. The statute under which it was organized, did not forbid it. A section of that act prevented any one from being entitled to vote except he possessed an interest in the capital to the amount of £25. It was also held that, under the charter the directors had the power. The *Lexington Railroad Company* vs. *Chambers*, 13 Metcalf, 110, and the *Kennebec Railroad Company* vs. *Jarvis*, 34 Maine Rep. 360, tend to support the same position. I repeat and condense these propositions, thus: The principles of a common law partnership govern joint stock associations, incorporated or unincorporated, except so far as modified by the statute, or fixed principles of law. The introduction of new members into a partnership, is, upon common law doctrine, only allowable upon a joint consent. This joint consent may be exercised and proven, either by an actual agreement in each particular instance, or by a delegation of the power

to assent, to a particular body, or to a particular person. If the delegation is made to a particular body, it may be accompanied, or not, with authority to that body to re-delegate it; and thus the question is first, whether the members entrusted the power directly to a particular officer; and next, if they did not, whether they entrusted it to a class of persons, with power of substitution; and lastly, have the latter made such substitution?

Now, if by a regular chain of devolved power, the authority to introduce new members into this partnership can be established, if by the act and agreement of the stockholders, the evidences of such membership are placed in the power of an officer to authenticate and issue, then a general power or agency has been delegated to him. And then his abuse or fraudulent exercise of that power will not prevent the company from being bound. This view meets the cogent argument of Mr. Wood, upon the nature of the agency in this case. What was the power delegated to Robert Schuyler, as transfer agent, and what was its extent? The first section of the charter passed 1st May, 1844, constituted Joseph E. Sheffield and others, naming them, "with such other persons as shall associate with them for that purpose, a body politic and corporate, by the name of the New York and New Haven Railroad Company." The second section provided that the capital stock should be two millions of dollars, with the privilege of increasing the same to three millions, and to be divided into shares of one hundred dollars each, which shall be deemed personal property, and be transferred in such manner, and at sueh places, as the by-laws of the company shall direct. By the third section, the parties who were authorized to receive subscriptions might make twenty thousand shares subscribed the capital stock of the company. But if the subscription exceeded thirty thousand, the same were to be reduced and apportioned in such manner as should be deemed most beneficial to the corporation. Under the fourth section, the immediate government and direction of the affairs of the company was vested in a board of nine directors to be chosen by the stockholders. Four of such directors formed a quorum for the transaction of business. By the seventh section, the directors were vested with the power to make by-laws and regu-

lations touching the disposition and management of the stock, property, and estate of the company, not contrary to the charter, or the laws of the State or of the United States; the transfer of shares; the duties and conduct of their officers and their servants; and all matters whatsoever, which may appertain to the concerns of such company." By the twentieth section, the act might be amended, altered or repealed at the pleasure of the General Assembly. In the exercise of the powers conferred by the charter a resolution was adopted by the stockholders to the following effect—(Book of Records, Nos. 20 and 21):—"Transfer and Certificates of Stock—The principal transfer office shall be in the city of New Haven, but transfer agencies may be established in the cities of New York and Boston, by resolution of the board of directors; and all transfers of stock at any office shall be made under, and in compliance with such rules and regulations, and by such instruments of assignment and transfer (which need not be under seal) as may from time to time be made, ordered and appointed by the Board of Directors. "Certificates of stock shall be in such form and issued under such rules and regulations as the Board of Directors may from time to time appoint and direct." The directors adopted the forms of transfers, certificates, and blank powers of transfer, and ordered their general use. On the 3d of February, 1847, the following resolution was adopted by the directors: "The receipts and certificates of stock on the books at New Haven, to be signed by J. E. Sheffield, as transfer agent; at Boston to be signed by J. E. Thayer & Brother, as transfer agents; at New York to be signed by Robert Schuyler, as transfer agent." Now, a certificate of stock is a written declaration that the party in whose favor it runs, is entitled to the shares expressed in it. It is a written admission that such person is a member of the company. The company is a partnership, except as expressly qualified. The certificate is, therefore, an admission that the person named is a partner. Did there then come down from the whole body of associates (the stockholders in this company), a power to Robert Schuyler to declare that the person mentioned in such certificate was a member? It seems to me that the affirmative is made out by the series of acts and resolutions I

have stated. I do not see what link in this chain can be broken. Grant this, and the first part of Mr. Wood's powerful argument is overthrown. That was in substance, this: You cannot, by any rational deduction, imply a power in an agent to do that which it was totally out of the power of the principal to perform. Yet more strongly—you cannot imply such power, when the principal was prohibited by the express law of the State from doing the act, and it was a violation of public policy and public law to do it.

The first proposition of this argument is met by what is above stated. Irrespective of statutory prohibition, there was a power in the company to admit new members, and that power had been delegated to Robert Schuyler. And then we are led to the next position of the learned counsel. Does the charter or statute law prohibit the act? It is perfectly clear that when the Legislature has prescribed a limit to the capital of a corporation, a direct increase of the amount would be a violation of the compact, and a ground of forfeiture. In granting corporate privileges, the regulation of the capital is governed by two considerations—the necessity of raising an amount sufficient to accomplish the public object, and the forbidding a larger accumulation of money or property in the hands of one body than is essential for that purpose. For a company then to transcend the fixed amount is to usurp a right to increase the great element of corporate power, contrary to a fundamental policy of the State. But it is not seen how this line of reasoning applies with the like or with any force to the increase by a company of the number of its shares, in any manner which leaves the capital precisely as it was before. If as before observed, the charter of a company had fixed a capital, but was silent as to the number or par value of shares, the company (or its agents if entrusted with the power) might adjust and readjust such number or value. If, again, when the charter, as in this case, directs that there shall be a defined number of shares of $100 each, the associates had agreed to increase the shares by reducing the par value of what they held by a given per centage, would that be a violation of the charter such as to work a forfeiture, or would it be a matter only affecting the individual members as to their pecuniary interests in the stock?

We find that under the present charter, there might have been thirty thousand members of the company. It is not easy to see what great rule of public policy is invaded if this number was voluntarily increased to forty thousand, the limited capital remaining the same. The effect in the case suggested would be that each stockholder would reduce his share, for which he has paid $100, to $75, and receive his part of future profits upon the latter sum. But it is here necessary to examine with care a decision of the Supreme Court of Massachusetts, pronounced by its late distinguished chief justice, bearing upon this point. The case is that of the *Salem Mill Dam* vs. *Ropes*, 6 Pickering 32, reaffirmed in 9 Pickering 187, and confirmed in 10 Pickering 147. It must be noticed that this case arose upon an action against a subscriber for payment of a call, which was resisted on the ground that his subscription was conditional, and that such condition had not been fulfilled. The charter was that the capital should be $500,000, and the shares 5,000, of $100 each. The directors had attempted to go on with the business of the company when only 2,687 shares had been subscribed. The Court held the defendant not responsible for the call, and the line of reasoning was in substance this: A subscriber has a right to the benefit of the expectation and possibility that the whole of the capital allowed by the charter may not be necessary for the object contemplated. If, then, when the capital is $500,000, and the shares 5,000 and each share of course $100, should it occur that $250,000 will suffice for the object, a subscriber for one hundred shares will only be called on to pay $5,000, or $50 a share. But if the shares are reduced in number to 2,500, each subscriber for 100 shares must pay $10,000, or his utmost limit. This would be against the condition of his subscription. Again, every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that each of the 5,000 shares should be liable to a tax of $100, to produce that effect. A power to reduce the shares to 1,000, without a power of taxing them beyond the $100, would be a power to expend $100,000, which might be totally insufficient, and might be wholly wasted and lost.

Now, it appears to me that it is inaccurate to say that these

cases prove that a reduction of the number of shares expressed in a charter, is a violation of that charter. It is correct to say that they prove that it is a violation or non-fulfilment of a condition in the contract, between a subscriber and the company, the terms of which contracts are found in the charter. Then the condition of the contract may be waived, modified, or insisted upon, at the will of the subscriber, with the assent of the company. And hence we are, in each particular case, to ascertain whether such was a condition of the contract, and whether, if it was, it has been waived. In this point of view the question was regarded by the Court, in the case of *Lexington and W. Cambridge Co.* vs. *Chambers*, 13 Metcalf, 311, and in the *Kennebec Railroad Co.* vs. *Jarvis*, 34 Maine Rep. 360. In the last case the Court says, that the contract there could not have had reference to any certain number of shares or certain amount of capital, as fixed by the charter, and there is no language used in the contract prescribing the number of shares, or the amount of the capital. It may be admitted that an increase of the number of shares, by a reduction of the value of those already issued, by affecting the amount of the profits of the holders as well as the actual sum represented, stands upon a similar footing as a reduction of shares which tends to increase his liability or endanger his advance. But the question still, in each instance, is one of contract and authorization. Upon this question of forfeiture of the charter, I have examined the following cases, and the result, in my judgment, is, that it is at least very doubtful whether the tribunals of Connecticut, would determine this charter to be forfeited by the adoption of this stock as part of the stock of the company, by reducing the value of the genuine shares in the manner pointed out. *Kellogg* vs. *The Union Co.*, 12 Conn. Rep. 7; *The State* vs. *The Essex Bank*, 8 Vermont Rep. 489; *Planters' Bank* vs. *The Bank of Alexandria*, 10 Gill & John. 346; *Attorney General* vs. *The Petersburg Railroad Co.*, 6 Iredell, 456; *The People* vs. *Oakland County Bank*, 1 Douglass, 282; *State of Mississippi* vs. *The Commercial Bank of Manchester*, 6 Smedes & Marshall, 233. See also the cases in this State, cited in Angell & Ames, sec. 776, note. There remains one point on this branch of the

case, to which the observations of counsel have been to some extent directed, and that is as to the effect of the possession of a certificate merely, with or without a power to transfer annexed to or accompanying it.

It is conceded, as a rule very general in its extent, that for the purpose of voting, or exercising any control in the management of the affairs of such companies, a registration on the books is necessary. Regulations of this nature are sometimes contained in the charter—sometimes prescribed in by-laws, and in our State directed by express statute as to various incorporations. It is sufficient here to refer to the general statute as to moneyed corporations,–(2 R. S., 596, § 36, 37 and 38,) and the general Railroad act adopting them, (Laws of 1850, ch. 140, § 5) and to the case of *Rosevelt* vs. *Brown*—1 Kernan's Court of Appeals, 152. Again, as a general rule, it may be stated that such registration is essential to release an apparent owner from responsibility to the calls or debts of the company. *Sayles* vs. *Blanc* 14 Queen's B. Rep. 205; *Wynne* vs. *Price* 3 De Gex & Smales, 310; *Adderly* vs. *Storms*, 6 Hill, 626; *Worrall* vs. *Judson*, 5 Barbour's Rep. 210. A certificate of the ownership of shares issued to a registered party, is, in truth, an evidence and declaration of a right of property to the shares expressed in it. The power to transfer, which may be annexed to it is immaterial as to the party's own title. It serves the office of enabling him to invest another party with his own absolute right of property and to obtain his recognition by the company as such. It serves the purpose of enabling such person to transfer the same right and interest to another, and so successively. But this can be accomplished by any instrument of assignment, and, indeed, by a mere endorsement on the certificate—*Commercial Bank of Buffalo* vs. *Kartright*, 22 Wendell, 362—that the certificate is the substantial ground and evidence of title and interest; and the power to transfer but an adjunct will, I think, appear from the following decisions.

In *Doloret* vs. *Rothschild*, 1 Sim. & St. 590, a bill was sustained for the delivery of certificates of stock in a loan, for which the plaintiff had subscribed. In ex parte *Barriere*, 11 Eng. L. & Eq. R. 128, a party who took a certificate of stock without complying

with a by-law requiring registration, was held responsible. In *Newry R. R. Co.* vs. *Edwards*, 2 Exch. Rep. 118, a person under similar circumstances was considered a shareholder from mere possession of the scrip. In *Cheltenham R. W. Co.* vs. *Daniel*, 2 Railway Cases 728, and *The same* vs. *Medina*, ibid 735 the purchaser of scrip certificates who sought to get himself registered, but accidentally failed, was held to be a member. In *Bagshaw* vs. *The Eastern R. W. Co.*, 6 Railw. and Canal Cases, 152, 166, Chancellor Wigram stated it as an indisputable proposition that the holders of scrip certificates in the stock of a company could sustain a bill to prevent the misapplication of the capital. There was an inchoate right in such persons to become general shareholders. In ——vs. *The Marblehead Co.* 10 Mass. Rep. 476, the delivery of a certificate with an endorsement upon it for valuable consideration, was held sufficient, and entitled the holder to the interest and title when the calls were paid in full. In *Ashley* vs. *Blackwell*, 2 Eden Rep. 300, where it was held that a company was responsible to a party whose stock had been transferred under a forged power, the lord keeper said that the letter of attorney was no part of the title, but only an authority to transfer. The title was an admission into the company as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of the attorney is only the authority to the company to transfer. And in *Fatman* vs. *Loback*, 1 Duer Rep. 354, this Court held that the holder of a certificate, with a power annexed in blank, could retain the securities for moneys advanced to the first pledgee of the stock, although the owner had paid such pledgee in full. The possession of the documents gave the pledgee an equitable title, which, by filling up the power, he could convert into a legal one. Indeed, it seems difficult to avoid the conclusion that, as between immediate parties, a mere delivery of a certificate as security upon obtaining a loan of money, would be an equitable pledge of the stock, equivalent to an equitable mortgage by a deposit of a loan. See *Russel* vs. *Russel*, 1 Br. C. C. 209; *Moore* vs. *Choat*, 8 Sim. 508; *Welsh* vs. *Usher*, 2 Hill Ch. Ca. 170.

It follows that the holders of certificates, even as I think, without powers of transfer, are equitably shareholders or members of this com-

pany, with a right to authenticate their title by procuring a transfer on the books. If they do not possess a power of transfer, it will only be a difficulty of evidence to make out their right. The result then is that the plaintiffs are entitled, under the certificate and power taken by them from Mr. Stevens, the President of the company, to be admitted as shareholders in the capital of this company in common with all other shareholders whose rights are admitted or shall be admitted, and that their right is in proportion to such whole number of holders allotted upon a capital of three million of dollars.

It will be seen that this view of the rights of the parties excludes any right to sue for damages or to sustain any action except upon the ground of common ownership, unless indeed the company refuse admission. Whether in such a case a suit for damages, or a mandamus, is proper, I do not consider. Since this opinion was written I have been referred to the case of exparte Hassinger, 2 Ashmead, 287. That case is strikingly in point, and the line of reasoning, in several particulars, similar to that I have pursued.

6.—The last subject of consideration raised by the counsel is, whether these plaintiffs are not so far chargeable with notice of the character of this stock, as that upon that ground alone they must fail in this action. It appears that Mr. Ketchum, one of the plaintiffs, was a director and officer of the company at the time of the fraudulent entry of the stock, and since; and it is insisted that he was bound to know the operations of the company, the position of the books, and that his knowledge is that of the firm. It is, as I understand, admitted that he was a stockholder. The general law which I have treated as applicable to this case, gives every partner an equal right to the control and inspection of the books, and charges every partner with a knowledge of their contents. Besides, this right belongs to every corporator by settled rules of law. *Rex* vs. *Shelly*, 3 T. R. 142; *Rex* vs. *Travanion*, 2 Chitty's R. 366 *n*; *Rex* vs. *Tower*, 4 M. & S. 162. Again by an act passed April 11, 1842. Sess. laws, 1842, Ch. 165, the transfer agent in this State, of any moneyed or other corporation existing beyond the jurisdiction of this state, shall, at all reasonable times during the hours of transacting business, exhibit to any stockholder of such foreign cor-

poration, when requested by him, the transfer books of such foreign corporation, and also a list of the stockholders thereof if in their power so to do. The second section imposes a penalty of $250 for a refusal to make such exhibition. It will not escape attention, that the fraud in the present case was of the most apparent and glaring character. On the face of the stock ledger, stood two entries of the enormous extent of 5,000 shares each; transferring those amounts from the transfer agent substantially to himself. And on the page of the ledger referred to in this entry, in the bald debit of 10,000 shares in two items, to the transfer agent. There never was a case of more flagrant neglect of all the accessible means of information than on the part of a director taking stock directly from R. & G. L. Schuyler. When such a case arises, it will be difficult to avoid the application of the rule which places a party who has knowledge of a fraud, or the path to knowledge of a fraud, plainly before him, in the same position as the criminal himself. In the language of a judge, who, at least, never left a decision or a proposition obscure, "It will be no public detriment if my decree tends to make the directors of public companies attend to the business of those companies, and teaches them not to leave the important transactions of millions to undirected clerks and book-keepers." (Lord Noythington, 2 Eden, 303.) If the consequences of the neglect fall upon the director, instead of the company, in the loss of his own demand, the rule will be yet more equitable in its application than it was in the case before the lord keeper.

I do not propose to inquire under what if any circumstances, a stockholder of the company, not a director, may be subject to a similar imputation of constructive notice. The field is wide and the cases numerous, upon the question of what shall be sufficient to affect the conscience of a purchaser with the consequences of the fraud of his seller. In the present case it may be doubtful whether the firm is bound by the constructive knowledge of a member chargeable upon him as director; but in the next place, the plaintiffs are entitled to shelter themselves under the want of notice, implied or actual in the bank. It does not appear that the bank, in its corporate capacity, or that any of its officers on its behalf, held stock, so as to

entitle it to examine the books. I have thus endeavored to discharge my duty in a case more serious and important than any other which it has been my lot to determine. No one can be more conscious than myself of my own inability to meet its difficulties and dissipate its darkness. No one could bestow more anxious thought and solicitude to decide it righteously. I humbly trust that the hope which I have imbibed from the source of all truth and peace may be realized, and that this fierce struggle may end like the contest for the wells of springing water between the servants of Isaac and the herdmen of Gerar, when the stream of the fountain of Rehoboth and the fruitfulness of the land followed and rewarded the submission of the patriarch.

The complaint must be dismissed with costs.

In the Supreme Court of Pennsylvania.

CADWALADER *vs.* MONTGOMERY.

Moroney's Appeal.

A mortgage in the common form was given to secure moneys covenanted to be advanced as buildings upon the premises progressed, *held*, per BLACK, C. J., LEWIS and LOWRY, JJ.; WOODWARD & KNOX, JJ. *dissentienibus*—

1. That the instrument by which the terms of the loan was regulated, need not be recorded.
2. That the mortgage had priority of lien over the claims of mechanics, from the date of its record, and not from the dates of its actual advance.
3. The agreement that the money should be appropriated towards paying for materials and workmanship, neither postponed the mortgage nor required the mortgagee to see to the application of the money.

From the District Court of Philadelphia.

These were appeals from the distribution of a Sheriff's Sale.

On the 7th of August, 1849, Cadwalader conveyed to Montgomery by several deeds sixteen lots, each fronting on Wood and Carlton streets, in the City of Philadelphia, reserving ground rents, which were the consideration for the grants.

On the same day, Montgomery mortgaged the premises to Cad-